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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. [redacted] 22

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, PETITIONER,

vs.

WINNIE BURTON.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
GILBERT L. HALL,
Counsel for Petitioner.

( )

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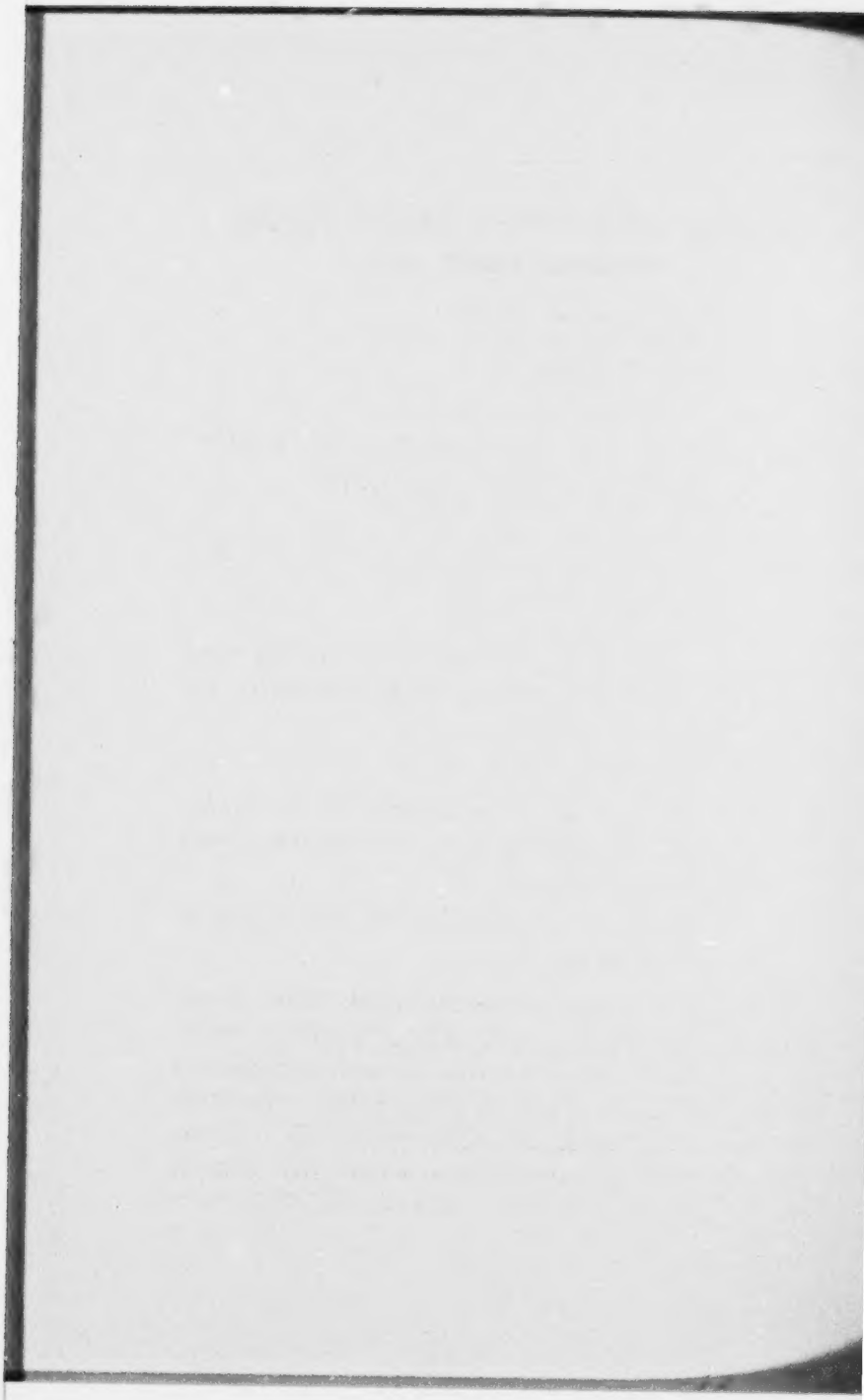

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1931.

No.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, PETITIONER,

vs.

WINNIE BURTON.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows and represents unto your Honors that:

1. Respondent sued in the Municipal Court of the District of Columbia upon a policy of insurance issued by petitioner in December, 1927, to and upon the life of respondent's husband, in which policy respondent was named as beneficiary. The amount claimed was three hundred and seventy-one dollars and interest (R. 1). Insured died in May, 1929 (R. 6). At the trial,

the Municipal Court, notwithstanding a stipulation in the *policy* that if insured was not in sound health at the date thereof the insurer might declare the policy void (R. 5), rejected all evidence offered by petitioner tending to prove that insured was not in sound health at the time the policy was issued, *on the ground that such evidence was incompetent under the statute quoted below* (R. 6, 7). Judgment against petitioner was thereupon entered (R. 2).

2. On writ of error from the Court of Appeals of the District of Columbia, the ruling of the Municipal Court in excluding the offered evidence was assigned as error (R. 8). The judgment of the Municipal Court was affirmed by the Court of Appeals on January 25, 1932 (R. 14).

3. The statute under which the evidence offered by petitioner was excluded is Section 657 of the D. C. Code (now Title 5, Sec. 183 of the Code of the District of Columbia, 1930 Ed.), as follows:

> "COPY OF APPLICATION TO BE DELIVERED WITH POLICY,—Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy *on account of anything contained in, or omitted from, such application.*" (Italics supplied.)

4. No defense was made or attempted to be made by petitioner "on account of anything contained in, or

omitted from, such application" (R. 7). There was, in fact, no copy of an application attached to the policy (R. 6); no reference therein to a written application, and no evidence at the trial that there had been a written application therefor (R. 7), and the policy itself contained a specific recital that it constituted "the entire agreement between the company and the insured, and the holder and owner [t]hereof" (R. 4).

5. It was provided in the policy itself that if the insured was "not in sound health" on the date of the issuance of the policy, the insurer might declare the policy void (R. 5). Petitioner refused to make payment upon the death of the insured upon the ground that *he was not in sound health* when the policy was issued (R. 6); but the rulings below precluded petitioner from proving that fact (R. 7).

6. The effect of the decision of the Court of Appeals was to wholly delete from the aforesaid statute the important qualifying words of the penalty clause which are italicized in the quotation above. The statute was construed as if the penalty clause had stopped with the word "policy," and thus had read—"in default of which no defense shall be allowed to such policy."

7. The reasons which your petitioner respectfully advances for the granting by Your Honors of the writ of certiorari as herein prayed, are:

(1) That the Court of Appeals has decided erroneously a question of general importance.

(2) That said decision is in conflict with all decisions in other jurisdictions involving similar statutes, and therefore tends to unsettle the law.

(3) That said decision, being the first rendered by any Federal Court, will establish an authoritative precedent which may greatly influence other courts in like cases.

(4) That if said decision is permitted to stand it may deprive insurers of *all defenses under all policies* of life insurance now outstanding or hereafter to be written in the District of Columbia when there are no written applications therefor or when copies of such applications are not attached to the policies.

WHEREFORE your petitioner prays the allowance of a writ of certiorari to the Court of Appeals of the District of Columbia in this case, there entitled *Washington Fidelity National Insurance Company,* a corporation, plaintiff in error, vs. *Winnie Burton,* No. 5264, that said cause may be reviewed and determined by this Court, and that the judgment of the said Court of Appeals may be reversed and set aside, and for such further relief and remedy in the premises as this Court may deem meet and proper.

WASHINGTON FIDELITY
NATIONAL INSURANCE CO.,
By HARRY G. WALTERS,
Agent.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
GILBERT L. HALL,
Counsel for Petitioner.

BRIEF IN SUPPORT.

Opinion Below.

The opinion of the Court of Appeals will be found at pages 12 to 14 of the record. Thus far it has been reported only in 60 Wash. Law Rep., at page 149.

Jurisdiction.

The judgment of the Court of Appeals was entered January 25, 1932 (R. 15). The jurisdiction of this Court rests on Section 240(*a*) of the Judicial Code as amended by Act of February 13, 1925.

The grounds upon which this Court's jurisdiction is invoked are stated in the petition, *supra,* at pages 3, 4.

Question Presented.

Whether the failure to attach copy of an application for life insurance to the policy precludes the insurer from interposing the defense, within the terms of the policy itself, that the insured was not in sound health when the policy was issued.

Statement of the Case.

The facts are sufficiently stated in the foregoing petition.

Specification of Error.

The Court of Appeals erred in holding that petitioner was not entitled to prove that insured was not in sound health when the policy was issued to him.

Argument.

The decision here sought to be reviewed precludes the insurer from interposing the defense to an action upon a life insurance policy that the *insured was not in sound health when the policy was issued.* The policy expressly provided that it might be declared void by the insurer if such were the fact, and it further provided that the policy *constituted "the entire agreement"* between the parties. The policy was complete in itself and contained no reference whatever to an application. The appellate court sustained the ruling of the trial judge that the defense stated above was not available because no application was attached to the policy. This conclusion was reached through an erroneous interpretation of the following statute:

> "Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy *on account of anything contained in, or omitted from, such application."* Sec. 657, D. C. Code (Italics ours).

The insurer offered no defense whatever on account of anything contained in an application nor on account of anything omitted therefrom. In fact, there was no evidence at the trial that there had been any written application for the policy. All the insurer sought to prove was that the insured was not in sound health

when the policy was issued (R. 7). This fact, if established, would have been a complete defense under the following terms of the policy itself:

> "If, (1) the Insured is not alive *or is not in sound health* on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, * * * then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud in which case all premiums will be forfeited to the Company." (Italics supplied.) (R. 5.)

The offered evidence was rejected by the trial judge, who ruled that the insurer could introduce no evidence whatever of the breach of the above terms of the policy because copy of application had not been attached thereto (R. 7). This ruling, which the Court of Appeals sustained, manifestly is not justified by the *language* of the statute. That language would seem to be unambiguous and to be confined to the denial of *defenses based* upon "anything contained in, or omitted from," *the application.*

As recently as February 15, 1932, in deciding the case of *Bergholm* vs. *Peoria Life Ins. Co.,* No. 297,

October Term, 1931 (U. S. S. C. Ad. Op., p. 306), this Court said:

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense."

But if there be uncertainty as to the intention of Congress, arising out of the language of said Section, it is proper, if not necessary, to inquire the purposes intended to be subserved by this legislation for such light as may thus be thrown upon the intention. These purposes have been referred to in a number of decisions involving similar statutes. In *Kirkpatrick* vs. *London Guar. & Acc. Co.* 139 Iowa 370, the Court said:

> "The purpose of the statute has been declared in a general way to be the prevention of any representations or warranties in the application being considered a portion of the contract, or available to the company as a defense, unless a copy of the application is incorporated or attached" (p. 373).

and in *Lenox* vs. *Greenwich Ins. Co.*, 165 Pa. St. 575, it was said:

> "The general intent was to keep these statements before the eyes of the insured, so that he might know his contract, and if it contained errors, have them rectified before it became too late" (p. 577).

The present Section 657 was enacted in 1902 and is an amendment of the original Act of 1901 (31 Stat., Chap. 854, Sec. 657, p. 1294). The original Act im-

posed no penalty for failure to attach copy of application. The addition of a penalty was the principal change made by the amendment and was expressed as follows: *"in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application."* If the purposes of legislation upon this subject were as stated by the Iowa and Pennsylvania courts, *supra,* how can it be supposed that Congress by the language last above quoted intended to deprive the insured of the benefit of express terms contained in the policy itself? If such had been the intention, the qualifying words—*"on account of anything contained in, or omitted from, such application,"* would have been omitted from the penalty, leaving it to read: *"in default of which no defense shall be allowed to such policy."* It is worthy of notice that this matter was twice the subject of consideration and legislation by Congress,—when enacting the original act of 1901 and the amended act of 1902.

Of the intention of Congress the Court of Appeals itself, in an earlier case (1918), referring to Section 657, said:

> "The manifest purpose of Congress in adopting it was to compel insurance companies, whether old line or fraternal, to state the entire contract either in the policy or the policy and application, so that the insured would be able to find the terms defining his obligations and rights as a policyholder in not more than two papers." (*Brotherhood of R. Trainmen* v. *Groves,* 48 App. D. C. 151, 154.)

All of the cases, under such statutes as Section 657, agree that, where the insurer fails to deliver a copy

of the application with the policy, the application is no part of the contract, and consequently the insurer may not defend upon any statement in or omission from the application, and may not offer the application in evidence for *any* purpose. In the present case, the insurer *sought to do neither*. All courts in which the point has arisen (except the Court of Appeals in the present case) hold that, unless the copy be attached, the application forms no part of the contract and the rights of the parties are to be determined by the terms of the policy alone. This is particularly emphasized when, as in the present case, the policy contains no reference to an application. But no other court (than the Court of Appeals) has held that the insurer who fails to attach a copy of a written application to the policy, is intended by these statutes to be penalized to the extent of denying it the right to show a breach of an express condition *of the policy* such as petitioner here relied upon. Petitioner was prevented by the ruling complained of from proving that the insured, who died within 18 months, was not in sound health when the policy was issued, and that, on the contrary, he was then in very bad health.

The Court of Appeals refers to none of the many decisions which have dealt with the question, nor to the text-writers upon the subject. Its opinion cites two cases only—both decided by that Court—and in neither was the present question considered or even touched upon. One of these is *Metropolitan Life Ins. Co.* vs. *Burch*, 39 App. D. C. 397, in which it was held that the requirement of Section 657, that copy of the

application be attached to the policy applied to the renewal of a lapsed policy; the other, *Metropolitan Life Ins. Co.* vs. *Hawkins*, 31 App. D. C. 493, that the insurer may not defend upon a warranty contained in the application, when a part only of the application was attached to the policy.

Statutes of the general nature of Section 657 are in force in approximately twenty states (1 Joyce on Insurance, 2d Ed., Sec. 190), and have been the subject of frequent interpretation by the State Courts. Careful research has failed to disclose a single decision in harmony with the conclusion of the Court of Appeals, or the views of any text-writer which would support that conclusion. It is not appropriate at this time to cite and discuss the long line of decisions upon this subject (not one of which is even mentioned by the Court of Appeals), but a few illustrative cases may properly be referred to.

In *Rauen* vs. *Prudential Ins. Co.*, 129 Iowa 725, a statute of Minnesota was involved which provided that "every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application." The Court said:

> "In our judgment the effect of this provision is to exclude or eliminate from the contract all reference to an application, a copy of which is not attached to the policy, and to render ineffective all defenses based upon anything contained in such application. To hold otherwise is to rob the statute of all effective force and

make its enactment meaningless. We are therefore disposed to hold that, if the application be not attached in obedience to the statute, the policy should be treated, construed, and enforced *as if no written application had been made"* (p. 731). (Italics supplied.)

In *Imperial Fire Ins. Co.* vs. *Dunham,* 117 Pa. St. 460, the Court said:

"The application was rightly excluded from the testimony. The provisions of the Act of May 11, 1881, P. L. 20, are conclusive on this point. No copy of the application or of the by-laws of the company was attached to the policy as that act requires; it constituted, therefore, no part of the policy or of the contract between the parties, and was not receivable in evidence. *The case is to be considered as if no such paper existed"* (p. 473). (Italics supplied.)

In *Metropolitan Life Ins. Co.* vs. *Scott,* 160 Miss. 537, the Court said:

"One evident purpose of the statute requiring the delivery to the insured of a copy of the application is to exclude or eliminate from the contract an application, a copy of which is not delivered to the insured with the policy, and to render ineffective any defenses or attempted defenses based upon anything contained in such application, but it does not follow that a failure to incorporate in or attach to the policy a copy of the application will preclude the company from relying on any defenses available to it under the terms of the policy. In the policy here involved there is no language or provision

indicating a purpose or attempt on the part of the appellant company to make anything found in the application a part of the contract. The policy was complete in itself, and purports to contain in plain language all the terms, conditions, and stipulations of the contract, and we do not think the company is precluded from relying on the express conditions and stipulations appearing on the face of the policy, by reason of the fact that the application contained representations or stipulations in reference to the same subject-matter. When the company chose to ignore the statements and representations appearing in the application, and incorporated in the policy in plain terms the conditions and stipulations upon which its validity should rest, and the policy was accepted by the insured as constituting a contract, it had the right to make any defenses it might have under the terms of the policy, without reference to such application" (p. 545).

In *Western and Southern Life Ins. Co.* vs. *Weber*, 183 Ky. 32, the Court said:

"For an additional reason it was error to sustain the demurrer to the third paragraph of the answer. As a defense it relied upon matters appearing both in the application and the policy, the latter containing this condition: 'And shall be void [the policy] if the insured * * * has had before said date [of the policy] any * * * disease of the brain.' Even if the statute which we have considered had been applicable to the facts of this case, a violation of it would not have prevented this defense, since it is one, as we have seen, based upon a condi-

> tion contained *in the policy* for '*the failure of the insurance company to attach a copy of the application to the policy will not preclude it from relying on any defense that it may have under the express terms of the policy without reference to the application*' " (p. 38). (Italics ours.)

In *Kirkpatrick* vs. *London Guar. & Acc. Co.*, 139 Iowa 370, the Court said:

> "The contention for appellee in the lower court and on this appeal is that, if representations or warranties were made in the application, a copy of which was not incorporated into or attached to the policy as required by statute, then no issue can be raised by the company as to representations or warranties found in the policy, although the policy makes no reference to such application; in other words, that although there are statements and warranties in the policy which, without reference to the application, are material to the contract, the defendant cannot raise any issue under such statements and warranties relating to the same subject matter, a copy of which was not incorporated into or attached to such policy" (p. 373).

and after discussing the point fully, the Court concluded, thus:

> "We are clearly of the opinion that the effect of failure to incorporate or attach an application by copy is to preclude the company from relying on any representations or statements in the application for the purpose of making out

its defense, and that *it is still open to the company to make any defense it may have under the terms of the policy without reference to such application*" (p. 377).

The conclusions of the text-writers from their consideration of the decided cases upon this subject are uniform, and indicate no doubts as to the proper interpretation of such statutes in this regard. Referring to the penalties which an insurer must suffer, if it omits to attach a copy of the application to the policy, the text-writer on the subject of "Insurance," in 14 R. C. L. at p. 886, concludes:

> "Failure of the insurance company to attach a copy of the application to the policy will not preclude it from relying on any defense it may have under the express terms of the policy without reference to the application."

1 Joyce on Insurance, 2d Ed., Sec. 190q, referring to the same subject, says:

> "The omission to endorse or attach a copy of the application does not, however, invalidate the policy, but only goes to the pleading and proof of the representations."

And in the same section the author says:

> "And where there is no reference whatever to the application and no reliance thereon or assertion of rights thereunder by the insurer, it is not precluded from defenses based only upon the policy itself."

In 2 Cooley's Briefs on Insurance, 2d Ed., p. 1091, et seq., many cases upon this subject are quoted and,

while the author points out the penalties for the failure to attach the application to the policy which are imposed by the statutes, as interpreted by the cases cited, it is nowhere suggested that the insurer is to be penalized to the extent of depriving it of the right of defending for breaches of conditions clearly set forth in the policy itself.

The present decision of the Court of Appeals is the first which has arisen in the Federal courts involving this question, and as that Court has the standing and dignity of a Circuit Court of Appeals, its decision is likely to have great weight when the same or a similar question arises in other courts.

It is believed that this Court should review and reverse the decision of the Court of Appeals because the question is one of general importance; because the decision is in conflict with all decisions upon the question in other jurisdictions; because it will establish an authoritative precedent in the Federal courts which may greatly influence other courts in like cases; and because, if permitted to stand, the decision may deprive insurance companies of *all* defenses under policies now in effect, or hereafter issued, when there are no written applications or when copies of applications are not attached to the policies.

Respectfully submitted,

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(1809)